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[fol 128]

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[fol. 129]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

No. 3745

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

vs.

IDAHO SHEET METAL WORKS, INC., a corporation, Defendant.

No. 3752

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

vs.

IDAHO SHEET METAL WORKS, INC., a corporation, Defendant.

MEMORANDUM OPINION—March 7, 1963

The Secretary of Labor has brought these actions against Idaho Sheet Metal Works, Inc., for alleged violation of the Fair Labor Standards Act, 29 U.S.C. §201 et seq. By Case No. 3745 the Secretary seeks to enjoin the corporation from violating the overtime provisions of the Act. By Case No. 3752 he seeks to recover unpaid overtime compensation allegedly due a former employee of the firm.

In Case No. 3752 the amount involved is not in dispute, and the issues of law are the same in each suit. The cases were consolidated for trial.

It is agreed that the Court has jurisdiction.

Defendant is engaged in the fabrication and sale of sheet metal products in and around Burley, Idaho. To an extent, [fol. 130] the corporation installs, maintains and repairs such products. A part of its business consists in sales to individual customers of such items as solder, sheet metal, water spouts and elbows.

Prices are computed on the same basis for all customers —i.e., fabricated products are uniformly priced on the basis of material, operating costs, labor, and a profit.

The greater portion of the company's business is with food processing plants in the Burley, Idaho, area which plants in turn are engaged in producing items going into interstate commerce.

Witnesses described the following items as typical of equipment fabricated for the food processors: a stainless steel receiving tank holding 5,000 pounds of peeled potatoes, hoods to carry off steam and vapor, stainless steel elevator buckets used in processing lines, and chutes to transfer products from one point or one belt to another. On two occasions defendant repaired and rebuilt drying equipment in a processing plant damaged by fire. Most of the work for the processors is carried out during the summer, when the plants are closed for the season.

The following issues of law are before the Court:

1. Whether defendant's employees were during the period in question engaged in the production of goods for commerce within the meaning of the Act.

2. Whether defendant's business is by nature outside the retail concept.

3. Whether defendant's employees are exempt from overtime requirements of the Act by virtue of their employment [fol. 131] in a retail or service establishment as defined by Sections 13 (a) (2) and 13 (a) (4) of the Act.

The Act provides at §203 (j):

> "* * * an employee shall be deemed to have been engaged in the production of goods if such employee

was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof,* in any State." (Emphasis added.)

Whether defendant's employees are covered by the Act depends on the interpretation of the underlined phrase.

In contending defendant's employees are included within this statute, the Secretary relies principally on Roland Electrical Co. v. Walling, 326 U.S. 657, 66 S.Ct. 413. This case was decided in 1946, prior to the amendment of §203 (j) in 1949. At that time the statute defined production of goods for commerce as including "any process or occupation necessary to the production thereof."

The more recent case of Mitchell v. H. B. Zachry Company, 362 U.S. 310, 80 S.Ct. 739 (1960) analyzes the scope of coverage under the Act as amended:

> "* * * The focus of coverage became 'commerce,' not in the broadest constitutional sense, but in the limited sense of § 3(b) of the statute: 'trade, commerce, transportation, transmission, or communication among the several States * * * .' Employment 'in' such activities is least affected by local interests. A step removed from employment 'in commerce' is employment 'in' production which is 'for' commerce. * * * Furthest removed from 'commerce' is employment not 'in' pro- [fol. 132] duction 'for' commerce but in an activity which is only 'related' to such production. * * * " (pp. 743-744)
>
> "* * * our purpose must be to isolate primarily local activities from the flow of commerce to which they invariably relate * * *." (p. 745)

Defendant's enterprise is a local business serving, on the same basis, both individual customers and corporations which produce goods for interstate commerce.

This Court is of the opinion that Mitchell v. Zachry teaches that employment in a local business such as we have here is not employment "in commerce or in the production of goods for commerce" to which employment the Act is confined. In this case the Supreme Court cited with approval the case of 10 East 40th Street Bldg. v. Callus, 325 U.S. 578, 65 S.Ct. 1227, (decided in 1945) at which time the Court distinguished between covered employment and employment in local industry when it said:

> "* * * Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. * * * Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act. * * *"

The reasoning utilized prior to the amendment of the Act in 1949 should be more forceful since the amendment when the amendment was for the obvious purpose of narrowing the coverage of the Act. According to Mitchell v. Zachry Congress has left the regulation of employment in local business to the states.

[fol. 133] Assuming that defendant's employees might be considered as having been producing goods for commerce within the Act, such employment is within the exemption of §213 which provides:

> "(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry * * *."

The Court finds from the evidence that all of defendant's sales were within the State of Idaho and its products were not sold for resale. The Court also finds from the evidence that the business conducted by defendant was and is considered to be retail within the industry as shown by the testimony of the manager of defendant corporation and representatives of companies selling materials to defendant.

The retail concept described in Roland Electrical Co., supra, was repudiated by the 1949 amendment to the Act. Mitchell v. Kentucky Finance Company, 359 U.S. 290, 79 S.Ct. 756; Boisseau v. Mitchell, 218 F.2d 734 (5th Cir. 1955).

The authorities relied on by plaintiff to establish the contention that defendant is "not within the retail concept" are distinguishable.

Accordingly, it is the opinion of this Court that plaintiff is not entitled to any relief in either of said cases.

Counsel for the defendant shall prepare Findings of [fol. 134] Fact, Conclusions of Law and a proposed Judgment, and shall submit copies of the same to counsel for plaintiff and the originals to the Court.

Dated this 7th day of March, 1963.

Fred M. Taylor, United States District Judge.

[File endorsement omitted]

[fol. 135]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil Action No. 3745

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

vs.

IDAHO SHEET METAL WORKS, INC., a corporation, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW —April 15, 1963

This cause having come over for trial before the Honorable Fred M. Taylor, United States District Judge, plaintiff appearing by James B. Liest, one of his attorneys and the defendant appearing by Eli A. Weston, its attorney, and the Court having considered all of the testimony and evidence, and the plaintiff and defendant having presented their case to the Court and briefs having been submitted by both parties, the Court having considered the record, files, and testimony in this action and being fully advised in the premises, hereby makes the following Findings of Fact:

I.

That the plaintiff, W. Willard Wirtz, Secretary of Labor, United States Department of Labor, brings this action to *enjoin* ~~recover from~~ the defendant Idaho Sheet Metal Works, *from violating the F.M.T.* Inc., a corporation, ~~unpaid overtime compensation due its~~

overtime
~~former employee~~, ~~William D. Combs~~, ~~under the~~ provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*), hereinafter referred to as the Act.

II.

The defendant is and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Idaho, having a place of business located at Burley, Idaho, within the jurisdiction of this [fol. 136] Court, and is, and at all times hereinafter mentioned was, engaged at that place of business in the fabrication, sale and servicing of sheet metal products.

III.

(a) That jurisdiction of this action is conferred upon the Court by Section 16(c) of the Act and by the Judicial Code, 28 U.S.C. 1337 and 1345.

(b) That by the provisions of Reorganization Plan No. 6 of 1950 (15 F.R. 3174, 64 Stat. 1263), issued under the Reorganization Act of 1949, 5 U.S.C., 133z to 133z-15, the functions of the Administrator of the Wage and Hour Division, United States Department of Labor, under the Act, were transferred to the Secretary of Labor.

IV.

The defendant is engaged in the City of Burley, a small farming community in the State of Idaho, in the making, selling, installing and repairing of sheet metal products including the sale of solder, sheet metal, water spouts, elbows and similar items and that during the years 1959, 1960, and 1961, defendant's products and services were sold to seasonal processing companies engaged in interstate commerce. The sales and services were for the most part made and rendered intermittently and/or during the "down" season.

V.

That the defendant's business was established for the purpose of serving the City of Burley and the surrounding community, making sales and rendering services to a variety of customers, predominating in number of sales to farmers, ranchers, local individuals and businesses. All of the defendant's sales and services were in the State of Idaho and on a retail basis.

VI.

That the defendant's business is local in its nature, was established for the purpose of serving the Burley area, *F.M.T.* ~~is isolated from interstate commerce~~, and is not closely related to nor directly essential to the production of goods for or in commerce, but for the primary purpose of serving local needs.

[fol. 137] VII.

The products sold and services rendered to the processing companies were for the most part similar to items which could be and sometimes are fabricated by the processing companies in their own in-plant shops. The products furnished by the defendant do not enter the channels of interstate commerce.

VIII.

The defendant's prices for services and products are computed on the same basis for all customers. Fabricated products are uniformly priced on the basis of material, operating costs and a profit. The defendant's non-fabricated products, such as steel, solder, and other items, are displayed on racks or shelves and are similar in this respect to what is described as a tin shop.

IX.

The defendant's establishment is recognized as a retail establishment by the defendant and salesmen within the

industry. None of the sales made by the defendant were for resale.

X.

During the years 1959, 1960, and 1961, 75% of the defendant's sales of goods or services (or of both) were recognized as retail sales or services in the particular industry in which the defendant was and is engaged. The defendant's establishment is recognized as a retail establishment within the particular industry in which it is engaged.

From the foregoing Findings of Fact, the Court submits the following Conclusions of Law:

I.

That the Court has jurisdiction in this case.

II.

That the defendant is not engaged in the production of [fol. 138] goods for or in commerce as defined by Section 3 of the Act.

III.

That the business conducted by the defendant meets all the tests of a retail establishment ~~as promulgated by the Administrator of the Fair Labor Standards Act~~ *F.M.T.* and is therefore a retail establishment and entitled to an exemption as such under the provisions of Sections 13(a)(2) and 13(a)(4) of the Act.

IV.

That the defendant's employees are exempt from the overtime requirements of the Act by reason of their employment by a retail and service establishment as defined in Sections 13(a)(2) and 13(a)(4) of the Act.

V.

That the defendant is entitled to a judgment of dismissal.

Dated April 15, 1963.

Fred M. Taylor, United States District Judge.

[fol. 139]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil Action No. 3745

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

vs.

IDAHO SHEET METAL WORKS, INC., a corporation, Defendant.

JUDGMENT OF DISMISSAL—April 15, 1963

This Cause Came regularly on for trial on the 4th day of September, 1962, before the Honorable Fred M. Taylor, one of the Judges of the above entitled Court, in the court room thereof in Boise, Ada County, Idaho, on the complaint of plaintiff filed herein and the answer of the defendant, Idaho Sheet Metal Works, Inc., a corporation, pursuant to order of the Court setting the case for trial. The plaintiff appeared by James B. Leist, one of its attorneys; the defendant appeared by Eli A. Weston, its attorney.

The Court having heard testimony on both sides and having prepared Findings of Fact and Conclusions of Law, the Court holds that the plaintiff has failed to prove their case and that the defendant, Idaho Sheet Metal Works, Inc., is entitled to a Judgment of Dismissal.

Now, Therefore, By virtue of the law and by reason of the premises aforesaid, It Is Hereby Ordered, Adjudged and Decreed That the above action be dismissed with prejudice.

Dated: This 15th day of April, 1963.

Fred M. Taylor, United States District Judge.

[fol. 140]

In the United States District Court

For the District of Idaho

Southern Division

Civil Action No. 3752

W. Willard Wirtz, Secretary of Labor, United States Department of Labor, Plaintiff,

vs.

Idaho Sheet Metal Works, Inc., a corporation, Defendant.

Judgment of Dismissal—April 15, 1963

This Cause Came regularly on for trial on the 4th day of September, 1962, before the Honorable Fred M. Taylor, one of the Judges of the above entitled Court, in the court room thereof in Boise, Ada County, Idaho, on the complaint of plaintiff filed herein and the answer of the defendant, Idaho Sheet Metal Works, Inc., a corporation, pursuant to order of the Court setting the case for trial. The plaintiff appeared by James B. Leist, one of its attorneys; the defendant appeared by Eli A. Weston, its attorney.

The Court having heard testimony on both sides and having prepared Findings of Fact and Conclusions of Law, the Court holds that the plaintiff has failed to prove their case and that the defendant, Idaho Sheet Metal Works, Inc., is entitled to a Judgment of Dismissal.

Now, Therefore, By virtue of the law and by reason of the premises aforesaid, It Is Hereby Ordered, Adjudged and Decreed That the above action be dismissed with prejudice.

Dated: This 15th day of April, 1963.

Fred M. Taylor, United States District Judge.

[fol. 141]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION —June 9, 1964 (omitted in printing)

[fol. 142]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 18,887, 18,888

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Appellant,

vs.

IDAHO SHEET METAL WORKS, INC., a Corporation, Appellee.

Appeal from the United States District Court for the District of Idaho.

OPINION—August 10, 1964

Before Pope, Hamley and Merrill, Circuit Judges.

PORE, Circuit Judge.

The Secretary of Labor brought two actions in the court below for the purpose of enforcing compliance by the defendant Idaho Sheet Metal Works, Inc. with certain requirements of the Fair Labor Standards Act.[1] In one action the Secretary sought to enjoin further violations by the defendant of the overtime provisions of the Act.[2] In the other action the Secretary sought recovery of unpaid overtime compensation on behalf of one of the defendant's employees.[3] The two actions were consolidated for trial [fol. 143] and after dismissal of the actions by the trial court, with prejudice, the appeals therefrom were consolidated for hearing in this court.

The facts here are undisputed. It is conceded that during the years 1959 through 1961, the defendant did not pay its employees, some twelve in number, in accordance with the overtime provisions of the Fair Labor Standards Act, and it is admitted that this practice has continued thereafter. It was stipulated that if recovery was had in the action to recover the employee's overtime compensation, recovery should be for the sum of $500 plus costs.

Upon the trial and in this court two questions were presented. The first question was whether any of the defendant's employees were engaged in the production of goods for commerce within the meaning of the Act. Since the record shows that the defendant's employees were engaged in the performance of work for its customers who were producing goods for interstate commerce, the query, stated more particularly, was whether defendant's em-

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201, et seq. Other amendments of 1961 (75 Stat. 65) are not material here.

[2] Such injunction proceedings are authorized by Sec. 17 of the Act (29 U.S.C. Sec. 217).

[3] Such an action is authorized by Sec. 16(c) of the Act (29 U.S.C. Sec. 216(c)).

ployees were engaged in a "closely related process or occupation directly essential" to the interstate production of its customers.[4] The second question presented is whether the defendant is a retail establishment exempt from the requirements of the Act under Sec. 13(a).[5] The trial court found against the Secretary on both questions.

[fol. 144] During the years 1959 through 1961, the defendant was engaged in manufacturing, installing, maintaining and repairing equipment made of sheet metal for five large potato processors located in the general area of Burley, Idaho, where defendant's place of business was located. During that period 83 per cent of defendant's gross income was derived from those customers. In addition it performed comparable work for five other companies which were en-

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[4] The section of the Act relevant in this regard is Section 3(j) which reads: "Sec. 3. As used in this Act— (j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

[5] The relevant portions of Section 13 read as follows: "Sec. 13(a). The provisions of sections 6 and 7 [the Act's minimum wage and overtime requirements] shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishments annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale, and is recognized as retail sales or services in the particular industry; or * * * (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: Provided, that more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *."

gaged in producing goods for interstate commerce including sugar mills, flour mills, seed and grain companies, and a container corporation. This accounted for an additional 3 per cent of defendant's gross income. The equipment which defendant fabricated or repaired for these companies included tanks of a capacity to hold 5,000 pounds of peeled potatoes, hoods for carrying off steam, and elevator buckets and chutes for transferring items within the plants.[6] During many weeks in those years the employees of defendant spent a substantial part of their total work hours in these activities relating to the fabricating of equipment for the customers mentioned. A substantial portion of this work was carried on in the customer's plant.

In dealing with the question whether the defendant's employees were engaged in production of goods for commerce within the meaning of Sec. 3(j) of the Act, the court, [fol. 145] while finding in so many words that the defendant's business was "not closely related to nor directly essential to the production of goods for or in commerce,"[7] based its conclusion upon its finding that the defendant's "enterprise is a local business". The reasoning adopted by the trial court was that once it had determined that the employer was engaged in a "local business" it followed that

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[6] The employees were sheet metal workers and they were employed at defendant's sheet metal plant which was a high ceilinged cinder-block building. The building was not equipped with any of the facilities common in a retail establishment in that it had no display windows, sales counters or cash registers. The equipment consisted of work benches and machinery for working on sheet metal. The metals used in the fabrication mentioned were primarily stainless steel, galvanized iron, black iron plate, aluminum and copper. The fabricated and installed equipment was not maintained in stock by the defendant but it was made to order in each case.

[7] Note that so stated this is not precisely the question involved under the Act which states the important query to be whether "such employee was employed . . . in any closely related process or occupation directly essential to the production thereof, in any state." (Emphasis added.)

his employees could not be engaged in the production of goods for commerce.

The trial court was led to this reasoning by its interpretation of the decision in Mitchell v. H. B. Zachry Company, 362 U.S. 310. While it is true that the opinion in that case contains certain references to "local business", to "activities of a dominantly local character", to "primarily local activities", and to "local production", we think that the trial judge was misled by the use of these phrases, and that, contrary to the trial court's opinion, the Zachry decision does not hold that employment in "a local business" excludes it from being treated as employment in the production of goods for commerce.

The court below fell into the same error which led to the decision of the Court of Appeals for the Fourth Circuit in Mitchell v. Lublin, McGaughy & Assoc., 250 F. 2d 253, 259. In that case the employees involved were draftsmen, field clerks and stenographers employed by an architectural firm. All of these employees worked with plans and specifications prepared by their employer for the repair and construction of various interstate instrumentalities including air bases, roads, radio and television installations. The Court of Appeals held that "the defendants in this case were independent engineers and architects engaged in essentially local activity in each of the offices which they maintained." Referring to the fact that the firm sent telegraph messages, and used the mails to transmit documents to other states, the court said (pp. 259-260): "[W]here the business is essentially local and there is no production of 'goods', communication which is merely incidental to the local enterprise cannot be classed as commerce. . . . [T]he Act does not attempt to regulate local activity. . . . [T]he [fol. 146] architectural work itself was local and of necessity gave color to the activities of their subordinates and took them outside the scope of the statute." After grant of certiorari this judgment of the Court of Appeals was reversed, Mitchell v. Lublin, McGaughy & Asso., 358 U.S. 211. The Supreme Court noted that the decision of the

lower court was based upon its conclusion that the activities of the employing firm were "local in nature". It held, however, that in order to determine whether these employees were engaged in commerce "we focus on the activities of the employees and not on the business of the employer." Said the Court (p. 212): "The test is 'whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.' . . . Respondent contends that *its* activities are essentially local in nature. But as we stated, Congress deemed the activities of the individual employees, not those of the employer, the controlling factor in determining the proper application of the Act. Here the activities of the employees show clearly that they are 'engaged in commerce' and thus are eligible for the protections afforded by the Act."

It is important to note that in the language just quoted the Supreme Court first inquired whether the work of the employees is "directly and vitally related to the functioning of an instrumentality or facility of interstate commerce." If that question is answered in the affirmative then it can be said that the enterprise is not a local activity. It is obvious that the Court of Appeals in that case, as did the court below in this case, began its inquiry at the wrong end by first asking whether the enterprise was a "local activity". As the Supreme Court in the Lublin case, above, made clear, that is in no sense the test.

In the Zachry case, supra, upon which the trial court relied, the respondent employer was a construction contractor employed to construct a dam for impounding water for a water district to supply water to the City of Corpus Christi. An unspecified amount of the water supplied by the district was consumed by facilities and instrumentalities of commerce. It was plain here that neither the city nor the district was engaged in the production of goods for commerce. The Court held in that case "neither a facility

[fol. 147] of 'commerce' nor a facility of 'production' is under construction. Operation of the completed dam will merely support production facilities; and construction of the dam is yet another step more remote." (p. 319) Thus the decision is based upon the Court's finding of the remoteness of the construction from any facility of commerce or of production that might be within the terms of the Act, and not upon any finding that the construction work was of "a local character." [8] In setting forth the test to be applied in a case of this kind the Court made it plain that an answer to the problem presented cannot be predicated upon a finding as to whether the enterprise carried on by the employer is local or otherwise. The Court alluded to (p. 315) "the governing principle that coverage turns upon the nature of the employees' duties, and not upon the nature, local or interstate, of the employer's general business."

A Supreme Court case whose facts most closely resemble those in the case now before us is Roland Co. v. Walling, 326 U.S. 657 (1949). Roland Co. was engaged in manufacturing, installing, and servicing electrical motors, generators, etc. A substantial portion of its business was done with companies directly engaged in interstate commerce. During practically every work week Roland's mechanics did some of this work for some of these customers, either in the repair of their motors or generators, in the reconstruction of used motors sold to them, or in performing electrical work at their establishments. It was held that these employees were engaged in the production of goods in interstate commerce and that they were within the coverage of the Act.

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[8] After finding the construction to be too remote from any production of goods for commerce to be either "closely related" or "directly essential" to production, it was not inappropriate for the Court to conclude that it was dealing with something which had a "local character".

The court below declined to follow the Roland case on the ground that the 1949 amendment of the Act[9] undercut its [fol. 148] authority, holding that the later case of Zachry, supra, disclosed that the Roland case was no longer good law.

In a later portion of this opinion we shall have occasion to point out the very limited effect which the 1949 amendment had with respect to the authority of Roland. The legislative history of the 1949 amendment shows beyond doubt that the holding in Roland that those employees were engaged in the production of goods in interstate commerce and were within the coverage of the Act, would not be affected by the 1949 amendment. During the discussion of the amendment on the floor of the Senate, Senator Holland, the main sponsor of the amendment, answering a question whether Roland would "be decided any differently under the proposed amendment," answered "definitely not". (95 Cong. Rec. 12505.) And in connection with the Conference report on the bill, the House Managers reported: "The bill as agreed to in conference also does not affect the coverage under the act of employees who . . . make, repair or maintain machinery or tools and dies used in the production of goods for commerce. . . . All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce." (Conference Report, Statement of the House Managers, U.S.Code & Cong. Serv., 91st Cong., 1st Sess. p. 2253.)

This brings us to the question which, as indicated in the Lublin case, supra, must be answered to resolve the first point presented here. We inquire whether the work of these

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[9] In 1946 Sec. 3(j) instead of referring as at present, to "any closely related process", etc., used the words *"any process or occupation necessary to the production thereof* in any state." By the 1949 amendment the italicized words just quoted were changed to the language of the Act which now reads "any closely related process or occupation directly essential to the production thereof in any state."

employees of defendant was "so directly and vitally related to the functioning" of these potato processors, sugar mills, etc., as to be in practical effect a part of those interstate enterprises. In the words of the Act, the inquiry is whether these employees were engaged "in any closely related process or occupation directly essential" to the production which was carried on by the potato and sugar processors, etc., previously mentioned. We think it is plain that the answer must be in the affirmative.

As we have indicated above, the trial court, besides holding that these employees were not covered by the Act, held also that defendant was exempt from the Act's minimum wage and overtime requirements by reason of its being [fol. 149] recognized as an establishment engaged in retail sales or services in the industry.[10] It is plain that this finding of the court was predicated upon testimony which defendant offered to the effect that within the industry the defendant's business was and is considered to be retail. We think that such is not an appropriate basis upon which to determine whether the retail exemption applies to the defendant in this case. In Mitchell v. Kentucky Finance Co., 359 U.S. 290, the defendant had succeeded in the Court of Appeals in maintaining its assertion of the retail exemption on the ground that "their activities are recognized in the financial industry as being 'in the retail end' of the industry." In reversing the decision of the Court of Appeals, the Supreme Court made it plain that even though an establishment's activities might be recognized as being retail in the particular industry, the establishment does not come within the meaning of the retail exemption

[10] The court's opinion stated as follows: "The Court finds from the evidence that all of defendant's sales were within the State of Idaho and its products were not sold for resale. The Court also finds from the evidence that the business conducted by defendant was and is considered to be retail within the industry as shown by the testimony of the manager of defendant corporation and representatives of companies selling materials to defendant."

unless its business falls within the "retail concept" of the Act. We had occasion to note this in Goldberg v. Roberts, 9 cir., 291 F. 2d 532, 534. As we there said: "If by its nature appellee's business is 'outside the retail concept' the Sec. 13 exception cannot apply."

The trial court here decided that defendant's business was within the retail concept in the following manner: It noted that in Roland, supra, the Supreme Court had held that concern outside the retail concept. There the Court said (p. 666): "[T]he exemption reaches employees of only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." It seems obvious that if the tests applied in the Roland case are applied here, we must conclude that the defendant is not within the retail exemption.

[fol. 150] The trial court disregarded the Roland test test stating that the retail concept described in Roland "was repudiated by the 1949 amendment to the Act", citing Mitchell v. Kentucky Finance Co., supra. But the latter case shows that the 1949 amendment served no such purpose. The Roland case had indicated approval of a rule to the effect that sales of goods or service for "business use" were not retail. The Kentucky Finance case shows, as does the legislative history of the 1949 amendment, that the sole purpose of that amendment was to do away with this "business use" test. The Court said: "We find nothing in the debates or reports which suggests that Congress intended by the amendment to broaden the fields of business enterprise to which the exemption would apply. Rather it was time and again made plain that the amendment was intended to change the prior law only by making it possible for business enterprises otherwise eligible under existing concepts to achieve exemption even though more than 25 percent of their sales [were not retail under the old

business use test]." 359 U.S. at 294. To the same effect see Goldberg v. Roberts, supra. That the 1949 amendment had this limited effect is clear from the legislative history of that amendment.[11]

When we consider all the facts in the present case, the operation in a factory-like building equipped only for manufacture and repair of the fabricated metal products, with a substantial portion of the time of its employees devoted to fabricating large metal equipment for use by potato processors, sugar mills and similar enterprises, we cannot agree that the enterprise fell within the retail concept described and referred to in these decisions.

In addition we should note that the 1949 amendments to the Act recited that prior rulings by the Administrator [fol. 151] with respect to enterprises within or without the retail exemption should remain in effect unless inconsistent with the statute as amended. In his 1942 Wage and Hour Manual, p. 326, secs. 29-31, the Administrator listed types of business which were outside the retail exemption and which were similar to the business of the defendant. Among these were "machine shops and foundries", "industrial blacksmiths" and "establishments engaged in sharpening and reconditioning industrial tools."

We hold that the defendant was not engaged in business within the retail exemption provisions of Sec. 13 of the Act.

The judgments are reversed and the causes remanded with direction to enter judgments for the appellant.

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[11] Representative Lesinski, one of the Managers for the House, referring to a reference to Roland in the House Managers' Statement, stated that this reference "should not mislead anyone into concluding that the conference intended to reverse or nullify that decision" (95 Cong. Rec. 14942).

The Senate Conferees' report stated that the amendment did not change the status of establishments "selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment in Roland Electrical Co. v. Walling, (326 U.S. 657)." (95 Cong. Rec. 14877.)

[fol. 152]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,887

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor, Appellant,

vs.

IDAHO SHEET METAL WORKS, INC.,

a corporation, Appellee.

JUDGMENT—Filed and Entered August 10, 1964

Appeal from the United States District Court for the District of Idaho.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court with direction to enter judgment for the appellant.

[fol. 153]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,888

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor, Appellant,

vs.

IDAHO SHEET METAL WORKS, INC., a Corporation, Appellee.

JUDGMENT—Filed and Entered August 10, 1964

Appeal from the United States District Court for the District of Idaho.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court with direction to enter judgment for the appellant.

[fol. 154] [File endorsement omitted]

[fol. 155]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Appellant,

vs.

IDAHO SHEET METAL WORKS, Appellee.

PETITION FOR REHEARING OF APPELLEE—
Filed September 10, 1964

[fol. 156] To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Idaho Sheet Metal Works, Inc., Appellee herein, respectfully requests a rehearing in this Court upon the decision of this court filed August 10, 1964 upon the following grounds and for the following reasons:

1. The court misinterpreted the Mitchell v. H. B. Zachery decision, 362 U. S. 310, in holding that the Zachery decision differed from the instant case. In both cases the employer's businesses were strictly local in nature, established to serve a local purpose and in the instant case the employee's relation to the interstate business was irregular, intermittent, remote and not closely related and essential to the operation of the interstate shipments.

The materials furnished for the interstate shippers were small items, not processing machinery, sold and installed at retail in the same manner that similar products would be sold to other purchasers and were sold and installed only at *intermittent and irregular* times and *almost all sales and services during the down period of the seasonal operations.*

On page 56 of the transcript we have the following statement from the president of the employer company.

> "Q. I was not talking of machinery, I was talking of equipment.
>
> A. Machinery or equipment.
>
> [fol. 157] Q. You do build potato processing equipment at Burley?
>
> A. Not processing equipment, no."

The record shows that the large item (five thousand gallon tank) was built as an emergency in 1955 after a fire.

In the Zachery case, as in the instant case, the store was built to serve a local purpose and as in the Zachery case, some of the employees of the defendant employer during some periods worked on materials that were sold to the interstate shipper and rendered services intermittently, irregularly and during the down period and as emergency services to the interstate shipper. Under these circumstances the defendant clearly feels that its employees cannot be construed as being closely related to and directly essential for the production of goods for commerce.

The important question involved in both the Zachery case and the instant case is whether the federal government is encroaching upon local business normally under the protection of the state.

All of the cases referred to by the government, including Roland Co. v. Walling, 326 U. S. 657, show that the employer and the employees involved were rendering an essential and necessary service or material *on a regular basis* either day to day or other regular intervals and that without these services and materials, the interstate companies [fol. 158] could not operate or function. This is not the fact in the present case. On page 84 of the transcript we have the following questions and answers propounded to the president of the company:

> "Q. Do you know of your own knowledge whether t' [illegible] rocessing plants could make the products that you

make and render the services that you render if they wanted to?

Mr. Leist: Object, its conjecture.

The Court: He may answer the question 'yes' or 'no' whether he does know.

By Mr. Weston:

Q. Do you know?

A. Yes.

Q. Could they operate without your services if they had to?

A. They could and do many times.

Q. Do you know the occasions where they use your services or buy your product, why?

A. Generally because we are more capable of doing them.

Q. Is it also because they are rushed sometimes?

[fol. 159] A. Yes—more capable and we are able to get on the job and get it done quicker because of the time element."

On page 81 of the transcript we find a statement by the government's principal witness that the materials purchased from the defendant employer were sometimes ordered in advance and quite frequently were not even delivered or used.

"Q. Is it a practice on some occasions to have them come to you and say in effect, 'We would like to have this particular thing made by you to be installed at a later date—an unknown date'?

A. That happens quite frequently.

Q. Do they sometimes ask you to make something and install it only during the down period?

A. Quite frequently.

Q. How do you work on that item that I have just described?

A. We work on it according to where the demand is. If we have other work that is demanding our time we work on that that is ordered when it is convenient.

Q. On these items or the similar items, they would have nothing to do with the plant's operation.

[fol. 160] A. At that particular time?

Q. Yes.

A. No."

And the same witness testifying as to the amount of work done in this manner:

"Q. Or percentagewise?

A. It would be very difficult, it's a very changeable situation."

On page 30 of the transcript:

"Q. You patronize the Defendant, as I believe you testified, when you are short of help and time and you want something done in an emergency and right away, is that correct?

A. That is correct."

The respondent respectfully suggests that the court erred in holding that the respondent's business is outside the traditional concept of a retail establishment. First, because the basis by which industries even remotely related to Respondent (Industrial Blacksmiths) were determined to be non-retail were so determined by application of the overruled and repudiated "Business use test." This court stated, in interpreting *Mitchell v. Kentucky Finance Company,* 359 U. S. 291, 3 L.Ed. 2d 615 (1959), in Goldberg v. Roberts, 291 F. 2d 532 (9th Cir.—1961) that industries once [fol. 161] considered non-retail will not because of the 1949 amendment be considered retail, *unless that non-retail determination was due to an application of the "Business Use" test.*

"The trial court correctly summarized the controlling principle established by Kentucky Finance.

'(1) It is that where it has been established by pre-amendment (i.e., Pre-1949) interpretation that an industry is not retail, *unless that classification was due to an application of the business use test,* that industry is not now exempt.' Mitchell v. Roberts, D.C.S.D. Cal. 1959, 179 F. Supp. 247, 249."

On page 535:

"In our opinion, then, the trial court erred in characterizing the pre-1949 status of mailing shops to be 'retail.' There is no indication that the pre-1949 classification of letter shops was based on the ground that such shops sell their services to businesses rather than to individuals for personal consumption. *Thus the pre-1949 classification of letter shops has not been shown to be founded upon the 'business use test,' which Congress specifically rejected in 1949* (see Mitchell v. Kentucky Finance Co., supra at pages 293-294, 79 S. Ct. at page 758). If this view of the case is accepted, no further investigation is required." (Emphasis supplied)

The 1942 Wage and Hour manual discloses that the cases [fol. 162] which classify "Industrial Blacksmiths," and "Machine Shops" as being non-retail are: Roland Electric Co. v. Walling, 325 U. S. 657; Guess v. Montague, 140 F. 2d 500; Walling v. Thompson, 65 F. Supp. 686. *The basis of all these decisions is an application of the "business use" test.*

While it was not the intent of the 1949 Amendment to give exempt status to those *industries already* declared non-exempt, it was also not the intent of this law to perpetuate the "business use" test, which will happen if every new industry's retail status is determined by cases using the business use test.

Secondly, the evidence clearly shows that the business under consideration is not similar to those in the Roland case, or any of the other cases cited by the Administrator. It is not an "industrial Blacksmith," "Machine Shop" or a shop engaged in "Reconditioning Industrial tools." It is a specific, well-defined business called the "Custom Sheet Metal Industry." Tr. pps. 63-76, 44, 54, 51, 112. Since it is a business having its own distinct characteristics it should be considered as of first impression, not pigeonholed into an unrelated industrial classification by virtue of decisions based upon a test now expressly repudiated. Respondents respectfully urge this court to consider this business independent of such broad classifications as "Industrial Blacksmiths," "Machine Shops," etc.

[fol. 163] Under all of the circumstances presented here, the Respondent respectfully requests a rehearing on the points urged herein.

Respectfully submitted,

By Eli A. Weston, Attorney for Appellee, 711½ Bannock Street, Boise, Idaho.

I, Eli A. Weston, attorney for Appellee and Petitioner, hereby certify in compliance with Rule 23 of the United States Court of Appeals for the Ninth Circuit, that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

Dated this 8th day of September, 1964.

Eli A. Weston

[fol. 164]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING—September 15, 1964

Before: Pope, Hamley & Merrill, Circuit Judges.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellee filed on September 10, 1964, with permission of the Court, for a rehearing of above cause be, and hereby is denied.

[fol. 165]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,887
18,888

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor, Appellant,

vs.

IDAHO SHEET METAL WORKS, Appellee.

OPINION ON PETITION FOR REHEARING—
Filed September 15, 1964

Before Pope, Hamley and Merrill, Circuit Judges.

Decision of the court in this case was rendered on August 10, 1964. Under our Rules the final day for filing a petition for rehearing was September 9, 1964. On September 10, 1964, one day late, the appellee presented to the

Clerk for filing a petition for rehearing. Although no application for an extension of time within which to file such petition was presented. It Is Ordered that said petition may be filed by the Clerk as of the date of its receipt.

Upon consideration of said petition It Is Ordered that the same be denied.

Martin L. Pope, Frederick G. Hamley, Charles Merrill, United States Circuit Judges.

[File endorsement omitted]

[fol. 166] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 167]

SUPREME COURT OF THE UNITED STATES

No. 754, October Term, 1964

IDAHO SHEET METAL WORKS, INC., Petitioner,

v.

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor

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ORDER ALLOWING CERTIORARI—March 1, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to Question 2 presented by the petition which reads as follows:

> "2. Is the employer's shop a retail establishment and entitled to the exemption as such under Section 13(a) of the Fair Labor Standards Act?"

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.